WORK SAFE. FOR LIFE.
WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Policy Background Paper

Clarification of Re-employment Policies:
Section 5 of the WCB Policy Manual

June 2021

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1. Introduction

1.1 Re-employment

The vast majority of injured workers (approximately 94%) successfully return to their pre-injury work. However, sometimes issues arise and a worker is not able to safely return to work in a timely manner. When this happens, the WCB supports all workplace parties working together to return the injured worker to employment. The re-employment sections of the *Workers' Compensation Act* (the "*Act*") support this process by setting out a re-employment obligation for certain employers. See Appendix A for the relevant sections of the *Act*.

Section 5 of the WCB Policy Manual provides further direction on the application of the re-employment obligations through sixteen policies which came into effect in 1995. These policies have not been reviewed since they were approved nearly twenty five years ago. With the passage of time, application of these policies can be confusing. This impacts stakeholders' ability to meet their obligations while at the same time created challenges for our staff in applying them efficiently and consistently.

The intent of the proposed policy revisions described in this paper are to clarify and streamline the current policy requirements. None of the draft revisions are intended to make substantive changes to existing re-employment obligations or rights. Instead, the changes are intended to improve understanding of the requirements and readability of the policies.

1.2 Policy Development Process

In December 2020, the WCB initiated Stage 1 consultation on re-employment and brought together small stakeholder groups to obtain their feedback on the issues and questions we should consider as we review the re-employment policies. To view the Stage 1 consultation Issues Identification Paper please go to the policy section of the WCB website at www.wcb.ns.ca.

This paper initiates the Stage 2 consultation process. In Stage 2 the WCB welcomes feedback on both this paper and the attached draft policy (Appendix D). The WCB Board of Directors will consider the feedback received during Stage 2 and determine whether further revisions to the draft are required before finalizing the policy.

2. Background

2.1 What is Re-employment?

The re-employment provisions of the *Act* are intended to mitigate the effects of workplace injury by requiring certain employers to provide an offer of re-employment to their workers who have been injured on the job and are able to return to work. The overall goal is to assist the worker in re-establishing a place in the labour market safely, and as quickly as possible, reducing the human and financial toll caused by work-related injuries.

2.2 Legislative and Policy Context

Legislation

Sections 89-101 of the *Act* set out the re-employment obligations. Employers are obligated to re-employ injured workers if they regularly employ 20 workers or more and are not in the construction industry. Workers are eligible to be re-employed when their injuries have rendered them temporarily unable to work, provided they had at least 12 continuous months of employment prior to the injury with the accident employer. Employers are required to offer re-employment until the second anniversary following the date of injury. This provides some finality to the employer's obligations and it affords the worker employment opportunities during the critical period following injury.

Offers of re-employment are linked to the worker's ability to return to work. If the worker can perform the essential duties of the pre-injury work, then the employer is obliged to offer to reemploy the worker in the pre-injury employment (or alternative employment). If the injury prevents the worker from doing the pre-injury work, but other work is within the worker's capability, the employer must offer any suitable work that becomes available. As the worker's condition improves, the employer may be required to offer work more compatible to the worker's ability. Where the worker is able to perform the essential duties of the work but requires assistance with the non-essential duties or with accessing the workplace, the employer has an obligation to accommodate the work or worksite to the point of undue hardship.

If employers are unable to meet the obligations specified by the *Act*, the law allows alternative offers of employment that recognize that, in some instances, re-employment is simply not possible at the pre-injury workplace. Where there is no re-employment opportunity, the worker retains the usual entitlement to WCB services and benefits.

An employer may argue an inability to meet the reemployment obligations, in whole or in part. The *Act* specifies a range of reasons which may be acceptable for failing to meet the re-employment duty. Where an employer should have offered reemployment, but has refused to do so, the WCB can issue an order to reinstate the worker and/or levy a penalty upon the company. The *Act* lists a number of ways in which the employer may mitigate this penalty and the WCB's approach is to take all reasonable action to ensure that employers abide by the reemployment obligations.

Policy

Section 5 of the WCB Policy Manual contains sixteen policies that support implementation of the re-employment sections of the *Act*. These policies were introduced in 1995 when the current *Act* came into effect. They have not been reviewed since they were initially approved.

Please see a listing of the policies, with a brief description of the key elements of each, in Appendix C. You can view the entirety of these polices in Chapter 5 of the policy manual on the WCB website at https://www.wcb.ns.ca/About-Us/Policy/Policy-Manual.aspx .DO.

2.3 Current practice

Return to Work at the WCB

The goal of the WCB's Return to Work (RTW) process is safe and timely return to work, ideally at pre-injury job demands. Our RTW model is based on the premise that work is healthy. There is an abundance of compelling evidence to support that work is generally good for health and well-being, and that long term work absence, work disability and unemployment generally have a negative impact on health and well-being.[1] The WCB works with all employers (whether they have re-employment obligations or not) to support workers getting back to work in a safe and timely manner.

Re-employment and RTW Case Management

Prior to engaging the re-employment obligation, the workplace parties would have already been active in the return to work process which occurs during recovery from the work injury. When work injury recovery has plateaued medically to the point the worker is fit for either the essential duties of the pre-injury job of for suitable employment, the re-employment process may be initiated.

If the employer is covered by the re-employment provisions in the *Act*, the case worker will inform them of these obligations early in the claims management process to ensure there are no "surprises" as RTW proceeds. The case worker is responsible to oversee the re-employment process in consultation with the case management team and the workplace parties. The WCB will determine the worker's ability to return to either the pre-injury employment or suitable work.

Following this determination, the WCB will notify the employer that the worker is able to return to work. Once the employer has been notified, the employer must return the worker to the workplace. The WCB will determine if the employer has met the re-employment obligations. If the employer has not re-employed the worker, then the WCB must determine if the employer is in non-compliance with the re-employment obligations and invoke re-employment.

It should be noted that in many instances, RTW and the fulfillment of re-employment obligations occur in a natural progression. That is, workers take on transitional or modified duties and eventually are able to return to their pre-injury employment with little WCB intervention and no requirement for the WCB to "officially" invoke re-employment.

Invoking Re-employment

When a case worker "invokes" re-employment, they are advising the employer they have not complied with their re-employment obligations in the *Act*.

The case worker typically invokes re-employment in the following instances:

- The employer refuses to re-employ an injured worker;
- The employer re-employs a worker in work that does not match what the worker is able to do; or

[1] The American College of Occupational and Environmental Medicine (ACOEM) recognizes the benefits of work in the recovery process and endorses Stay at Work/Return to Work Programs. The Canadian Medial Association (CMA) also promotes safe and timely return to work as a significant benefit to a person's recovery from an injury.

- The worker seeks assistance from the WCB in determining if the employer has met the re-employment obligations. If a worker believes they are entitled to re-employment and that the employer has not met the obligation, the worker can apply directly to the WCB for a determination of the obligation and entitlement.

When re-employment is invoked, the employer is notified they are in non-compliance with the re-employment provisions. When an employer is found to be non-compliant a case worker may issue an order of reinstatement and/or levy penalties.

Reasons for Failure to Re-employ

When the employer believes they are not obligated or refuses to return the injured worker to the workplace, the onus is on the employer to provide a justification for the refusal. The determination of employer obligations will be expedited through the normal case management process. If the reason for the failure to re-employ is not accepted by the WCB, the employer is determined to be in non-compliance of the provisions, and an order to re-employ is issued and a penalty may be levied.

Appeals of re-employment decisions are made through the WCB's Internal Appeals processes.

2.4 Inter-Jurisdictional Information

There are six other WCB's in Canada that have a legislated re-employment obligation. This includes the remaining three Atlantic WCBs' (NF, PE, NB) as well as ON, MB, and YK. AB instituted a re-employment obligation in their legislation in 2019, but it was repealed in April of this year.

Most WCB's use one or two policies (MB, NB, ON, PE) to address the topic of re-employment. In some instances it is merged with a policy on RTW or vocational rehabilitation. The remaining two WCBs use six (NF) or seven (YK) to address the topic.

The table below provides the re-employment basics in the provinces that have a legislated obligation to re-employ in their workers' compensation legislation.

Jurisdiction	Re-employment Obligation Basics
NF	• The re-employment obligation applies for two years, from the date of injury, for employers who regularly employ twenty or more workers; or one year after the date the employer is notified by WorkplaceNL that the worker is medically able to perform the essential duties of the pre-injury job. • Specific rules for construction industry. • Worker must have been employed for at least one year immediately prior to the date of the worker's injury.
PE	• The re-employment obligation applies for two years, from the date of injury, for employers who regularly employ twenty or more workers; or until the date the worker reaches age 65. • Construction industry is excluded as well as volunteer firefighters. • Worker must have been employed for at least twelve continuous months at the time of the injury to be eligible to be re-employed.

Jurisdiction	Re-employment Obligation Basics
NB	• The re-employment obligation applies for one year, from the date the injured worker is entitled to compensation, for employers who regularly employ fewer than twenty workers. • The obligation is two years from the date the injured worker is entitled to compensation for employers who regularly employ twenty or more workers. • The employee must have been employed at least 12 continuous months on the date of the injury to be eligible for re-employment.
ON	• The injury employer is obligated to re-employ the worker until the earliest of: two years from the date of injury, one year after the worker is medically able to perform the essential duties of their pre-injury work, or he date on which the worker reaches 65 years of age. • Worker must have been employed for at least twelve continuous months at the time of the injury to be eligible to be re-employed. • Different obligations apply to the construction industry
MB	• Employers who employ twenty-five or more full-time or regular part-time workers must re-employ workers who have been employed by the employer for at least twelve continuous months prior to the date of accident and have been unable to work as a result of a workplace accident. • An employer's obligation to offer re-employment ends on the second anniversary of the accident date, or six months after the worker becomes medically able to perform the essential duties of the pre-accident employment or suitable work, or the date the worker would have retired, whichever is earliest.
YK	• An employer who regularly employs 20 or more workers is obligated to re-employ workers who have been had been in an employment relationship for a continuous period of at least one year immediately prior to the date of the work related injury. • The employer is to re-employ the worker until the earliest of three dates: a) two years after the date of the work-related injury; b) one year after the date the worker is medically able to perform the essential duties of the worker's pre-injury employment or c) the date on which the worker reaches the age that a worker turns 65.

3. Issues Raised by Stakeholders - Stage 1 Consultation

3.1 Virtual Feedback Sessions

The WCB held 4 virtual feedback sessions for stakeholders. Two meetings were held with employer representatives and two with injured worker /labour representatives on March 16 and 23, 2021. Participants were provided with an Issues Identification Paper and a slide deck prior to the meetings. One worker stakeholder provided a written submission following the sessions. See Appendix B for a listing of attendees.

3.2 Feedback from Stakeholders

The following is an overview of the feedback received with brief commentary by the WCB.

- ***There was general support for re-organizing and consolidating the re-employment policies.***

Both worker and employer representatives were supportive of "cleaning up" the re-employment chapter of the WCB Policy Manual.

WCB Comment
The WCB has taken the opportunity to consolidate the 16 separate re-employment policies (some of which consist of only one or two sentences) into a single policy. We believe this provides a more cohesive presentation of the policy content, eliminates some duplication, and increases readability.

- ***Application/enforcement of current re-employment requirements***

Worker stakeholders believe the primary re-employment issue is that the WCB does not sufficiently enforce the re-employment provisions of the *Act*. Employers were generally comfortable with the current level/approach to enforcement and were concerned the WCB may be moving to a more punitive model.

WCB Comment
The WCB works with the workplaces parties to facilitate a successful RTW. This usually doesn't require officially invoking the re-employment provisions of the *Act* by issuing orders or levying penalties. Explaining the obligations of each party (worker and employer) and seeking innovative solutions often resolves many obstacles to re-employment. However, where the WCB determines an employer has not met their obligations and/or has not provided a sufficient rationale for not re-employing a worker, the WCB will invoke the re-employment provisions and issue appropriate orders and penalties. Please see section 4 of this paper for a discussion of revisions to the penalty provisions, and section 9 of the draft new policy for the actual wording of the revisions.

- ***Concerns about RTW practices***

Both worker and employer representatives would like to see role clarity for the workplace parties in RTW, better communication by the WCB, and improved training of case workers.
Employers outlined some specific concerns/questions:

- Who is responsible for the development of the RTW plan?
- What's the role of the case manager to provide updates and lead activities? Employer should know well in advance what their obligations will be.
- What are the worker's responsibilities? Is there a limit to how many times the worker can say "no" to duties?

Workers had some specific concerns as well:

- The WCB pushes workers back to work when they are not physically able. In some cases, workers are forced back to transitional duties that are not meaningful and are

designed only to reduce claims costs/rates. This results in bullying of workers and additional stress for the injured worker.
- Transitional duties are dragged out to run out the re-employment clock, thereby eliminating the employer's duty to re-employ.
- Physio time should be part of the transitional duties, meaning the worker should get TERB for time spent going to physio.

Workers believe, in light of concerns about RTW practices, the WCB should create a policy establishing protocols for the WCB's RTW plans.

WCB Comment

When a workplace injury occurs, staying connected to the workplace and continuing to work is the most important factor in recovery. The longer employees are off work, the less likely they are to return. The WCB's goal is to work with employers, employees, unions and health care providers to ensure a safe and timely return to work. Through the role of the WCB Case Manager, open, clear and frequent communication is an integral part to a successful return to work plan.

If workers or employers have any concerns or questions with the adjudication of the claim and/or the return to work process they should contact the Case Manager immediately.
As well, the WCBs corporate website, including the recently launched Working to Well site, is a valuable source of key information on the entire RTW process, including roles and responsibilities.

During the development of the next Annual Policy Work Plan the WCB will consider the feedback we have received during this consultation, including the suggestion for a RTW policy.

- ***Concerns with the use of "extras"***

Worker stakeholders raised a concern about situations where an injured worker returned to work on transitional duties but continued to be paid temporary benefits by the WCB rather than wages by the employer. Two WCAT (Workers' Compensation Appeals Tribunal) decisions were cited where the Tribunal rejected the WCB's practice of considering a worker as an "extra" and paying Temporary Earnings Replacement Benefits (TERB) while participating in a return-to work program. A worker participating in a return-to-work program/re-employment must be provided with meaningful and productive work and be paid regular salary and benefits for every hour worked.

WCB Comment

Like some other jurisdictions across Canada, the WCB employs several return to work strategies to assist injured workers to return to productive employment as soon as they are able. In addition to work conditioning programs combined with at home exercises provided through physiotherapy clinics, one of the options includes the worker returning to work as an 'extra' person while someone else does his/her regular job (or where the injured worker works at a reduced capacity performing light/modified work with or without reduced hours). The worker contributes when and what they can based on their functional capabilities. Of importance is the fact that this type of arrangement is considered medically therapeutic and generally beneficial to

the worker. This practice promotes early and safe return to work, and allows injured workers to rehabilitate on the job. During this form of rehabilitation some employers have a duty to accommodate and will pay wages directly to the injured worker whereas others only have the ability to offer the environment to support rehabilitation while injured worker continues to received TERB benefits for a defined period of time. Each situation is considered on a case-by-case basis.

- ***There is a need to clarify how WCB re-employment provisions, human rights legislation, and collective agreements work together***

Both worker and employer reps identified a need to clarify how these laws and obligations work together. Workers were clear in their belief that RTW/re-employment must be consistent with human rights legislation.

WCB Comment
The WCB has addressed the relationship between WCB re-employment provisions and human rights legislation in the draft policy. The relevance of collective agreements is also addressed (as it was in the current policies) in the draft policy. Please see Section 4. of this paper for further discussion of the topic and section 1. of the draft policy for the actual wording the policy provision.

- ***Undue hardship***

Workers, and some employers, were supportive of expanding upon what is meant by "undue hardship" in reference to accommodating an injured worker. Some identified the Ontario Human Rights Commission's approach as a blueprint for the WCB.

WCB Comment
The WCB has made draft revisions to the re-employment policy providing more guidance on what is meant by accommodation and undue hardship. Please see section 7. of the draft policy. The Nova Scotia Human Rights Commission administers the *Nova Scotia Human Rights Act* and therefore we have used The Commission's approach to undue hardship in the draft revisions.

- ***Relationship between re-employment and RTW***

Workers believe it is clear that re-employment provisions apply to transitional duties and the RTW process, and that Maximum Medical Recovery (MMR) and worker re-employment at full duties are not required to enforce re-employment obligations. The only provisions in the *Act* relating to an injured worker's capacity to return to work is under the re-employment provisions of Sections 89 to 101.

WCB Comment
Re-employment is one of the stages along the way to achieving a successful RTW. As explained previously in this paper, prior to engaging the re-employment obligation, the workplace parties would have already been active in the RTW process which occurs during recovery from the work injury. In many instances a worker returns to their pre-injury employment with minimal intervention from the WCB. The WCB typically takes on a more

prominent role in re-employment when there are disagreements between the workplace parties and it becomes clear WCB facilitation and/or enforcement is required.

Injured worker participation in RTW is based upon Section 84 of the *Act*, which requires injured workers to take all reasonable steps to reduce or eliminate any permanent impairment and loss of earnings resulting from an injury. This includes accepting transitional duties where offered and medically suitable for the worker. In light of employers' legal obligation to re-employ and accommodate workers as per provisions in the *Act*, participating in RTW and offering transitional duties supports meeting these legal obligations. Such activities may also support employers in meeting any accommodation requirements they may have under human rights legislation or collective agreement provisions. Employers also have cost/benefit incentives to participate in RTW based on WCB premiums, human resources impacts, etc.

The WCB agrees there is no requirement in the *Act* or policy that states a worker must reach MMR before the re-employment provisions of the *Act* become applicable. An employer's re-employment obligations are triggered when the employer is notified by the WCB that a worker is able to return to work at their pre-injury employment (able to carry out essential duties) or suitable work. Consequently, before notifying the employer of the worker's status, the WCB must determine if the worker is medically capable of performing pre-injury employment or suitable work. This may, or may not, mean the worker has reached MMR. The worker's medical condition/function, the nature of the worker's pre-injury employment, the availability of suitable employment, and any work accommodations required will all be considered before the WCB makes a decision on if/when it is appropriate to notify an employer that a worker is ready to RTW.

- ***Time limits***

Workers believe any time limits established for employers to respond to a notice that a worker is able to RTW are unnecessary, or should be very short. Employers should be in constant contact with the case worker and be aware of when a worker will be able to return to work. As well, the *Act* is clear that the employer, upon receiving notice the injured worker can return to work, is obligated to offer the appropriate opportunity.

WCB Comment

The intent of the *Act* is clear – employers are meant to act quickly to re-employ their injured workers. For example, Section 97 of the *Act* states employers are required to immediately offer to reinstate the worker in the position the worker held on the date of the injury upon notice that a worker is able to perform the essential duties of the worker's pre-injury employment. The WCB believes this intent should be carried through to orders issued under Section 99 of the *Act* to re-employ where it has been determined an employer has not fulfilled their re-employment obligations. The re-employment obligation is time limited and therefore re-employment should occur as soon as possible after the employer has received an order to re-employ. Please see section 9. of the draft policy for revisions that reflect this principle.

- ***Changes to Legislation***

Workers support removing the 2-year limit on the re-employment obligation because they believe this is inconsistent with human rights legislation. In the meantime, policy should be

amended to extend the 2-year timeframe if a recurrence of an injury occurs more than 12 months after the date of reinstatement. It was also recommended the re-employment obligation be extended to the construction industry.

WCB Comment
The WCB does not have the legal authority to change the *Act*. This can only be done by the Legislature or Cabinet. As well, the WCB cannot create policy that is inconsistent (such as extending the re-employment period) with the *Act*. However, in response to feedback on the need for clarity between the WCB re-employment obligations and other legislation like the *Human Rights Act*, a new section has been added to the policy. Please see section 4. of this paper as well as section 1. of the draft policy.

- ***Section 81 of the Act.***

Workers have suggested including guidance on Section 81 in the re-employment policy. Section 81 of the *Act* gives the WCB the authority to deny or reduce compensation if the work-related injury was caused by activities that were determined by the WCB to be unsafe for the worker.

WCB Comment
The focus of the draft policy is the re-employment provisions set out in Section 89-101 of the *Act*. We do not believe it would be appropriate to include the section in the re-employment policy. If a worker has a concern regarding the application of S. 81 to their situation, they should consult with their caseworker. They also have the right to request a written decision on the issues at hand, as well as the right to appeal the decision if they are dissatisfied with the outcome.

- ***Current re-employment policies are not supported by the legislation***

Workers have raised concerns that some re-employment policies are inconsistent with the *Act*. In particular the following were identified:

- Statement 2 of *Policy 5.2.3 - Termination Within the Re-Employment Period* should be removed as it places the onus on a worker to provide evidence that termination from employment more than 6 months after reinstatement, but still within the re-employment period, is related to the injury and/or claim. Sections 94 and 95 place no such onus upon the worker and statement 2 is inconsistent with the intent and principles of the *Act*.
- *Policy 5.3.1 - Employer Defenses* should be rescinded. Sufficient evidence of undue hardship should satisfactorily address any unforeseen circumstances which are beyond the control of the employer.

WCB Comment
The WCB agrees that the *Act* does not place specific onus on the worker to provide evidence that a termination from employment more than 6 months after reinstatement, but still within the re-employment period, is related to the injury and/or claim. However, a worker (or employer) could have valuable information that may assist the WCB in making such a determination. Therefore this policy provision (currently reflected in *Policy 5.2.3*) has been revised to remove reference to an “onus” on the worker to provide the evidence. The revised provision can be found in section 8. of the draft policy.

Policy 5.3.1 - Employer Defenses sets out some general defenses an employer may make for not re-employing a worker. These defenses are taken from Section 94(4) of the *Act*. A review of the 1995 background paper released when the re-employment policies were approved indicates these defenses are not intended to replace a claim of undue hardship as a reason for not accommodating a worker. Rather, *Policy 5.3.1* and Section 94(4) of the *Act* address other reasons for why an employer may not be able to meet their re-employment obligations. This includes, for example, the re-employment period ends, the worker refuses an offer of re-employment, or staff doing that function have been laid off. The policy has been revised to clarify the intent of the policy provisions. Please see section 8. of the draft policy.

- ***The WCB should provide clarity on accommodating a worker at different location***

Some employers would like clarity on whether/if it is appropriate for an offer of alternative duties or an accommodation to include placing the worker at a location different from the one where they performed their pre-injury work.

WCB Comment
The WCB agrees that more clarity on this issue would increase transparency and consistency in WCB decision-making. Therefore the draft policy includes some guidance on this issue in section 5. of the draft policy.

- ***Penalties for non-compliance with re-employment obligations***

Employers commented they would like clarity on how the re-employment penalty provisions of the *Act* work. Workers believe policies *5.4.1 - Order to Re-Employ* and 5.4.2 - Penalties Under Section 99 for Breach of Re-Employment Obligations are clear and could actually be removed because they essentially repeat the content of Section 99 and 209 of the *Act*. Rather, it is the unwillingness of WCB to enforce re-employment obligation and implement penalties for non-compliance that is the problem.

WCB Comment
Over time, the WCB has recognized that these policies are confusing and may not be in alignment with the intent of the *Act*. This has, at times, made it difficult for staff to initiate the penalty process. The WCB has re-organized and clarified the penalty provisions. Please see section 9.of the draft policy.

- ***Definitions***

Some workers felt the definitions were generally adequate with the exception of the phrase “the case management process has not been completed” in *Policy - 5.1.3 - Case Appropriate for Re-Employment.* An employer believes that the definition of “date of injury” for purposes of re-employment in *Policy 5.2.1R - Determination of Date of Injury for Purposes of Re-Employment* should be eliminated.

WCB Comment

Policy 5.1.3 - Case Appropriate for Re-Employment states the WCB can defer or deny a case for re-employment where "the case management process has not been completed". The WCB finds this phrase is overly broad in this context. For example, an injured worker could be in case management for an extended period of time without it necessarily impacting their ability to be re-employed. Therefore, this policy provision has been clarified. See section 4. of the draft policy.

In 1995, when all of the re-employment policies were being developed, the WCB Board of Directors considered the issue of the interpretation of the phrase "date of injury" in the context of re-employment. The Board came to the conclusion that it would be appropriate to define "date of injury" to be the date the time loss commences for the purposes of the re-employment provisions in the *Act*. This is because Section 90 of the *Act* states that for a worker to be eligible for re-employment, the injury must render them unable to work. This indicates that the re-employment period starts from the time the worker ceased work as a result of the work injury. This interpretation ensures that situations where the date of injury may differ from the date of time loss are treated equitably. These situations include occupational disease and gradual onset claims as well as delayed onset claims where the worker does not initially lose time from work. (e.g. as in the case of hernia claims). To clarify this interpretation, the Board used its policy making authority, as set out in S. 183 of the *Act*, to define the "date of injury" for the purposes of re-employment to be the "date the time loss commences".

4. Proposed Policy Approach

As discussed earlier in the paper, the goal of the review of the WCB's re-employment policies is to clarify requirements and improve understanding and readability of the content. This will support consistent decision-making by the WCB and ensure workers and employers understand their rights and obligations. To that end, the WCB has consolidated 16 re-employment policies into a single policy. This means the 16 existing policies will be rescinded and replaced with one policy.

The following is a brief description of the key policy revisions. To view the entire draft re-employment policy please see Appendix D. To view a Table of Concordance that explains where the content of the current polices can be found in the draft policy please see Appendix E.

4.1 Addition of a preamble

A preamble has been added to the policy. It places re-employment in the overall context of RTW and specifies the purpose and intent of the policy.

4.2 Relationship between re-employment and human rights legislation

Stakeholders identified a need to clarify how the re-employment provisions of the *Act*, and human rights legislation work together. The layering of these rules can result in complex workplace circumstances. This section, at a high level, explains the relationship between the pieces in the context of WCB re-employment obligations.

4.3 Inclusion of section on worker obligations

This section highlights the duty of workers to mitigate earnings loss by cooperating in the re-employment process.

4.4 Factors to consider when determining if alternative employment is comparable to the pre-injury employment

Workplace parties are often faced with needing to determine if alternative employment offered by the employer (when they are unable to offer pre-injury employment) is considered to be equivalent in "duties, functional demands, obligations, rights, rules, earnings, qualifications, opportunities and any other pertinent aspects which are considered to be relevant" as required by policy. To assist in making this determination, a series of factors that may be considered have been added to the draft policy in section 5.

4.5 Worker refusal of offer of re-employment

For completeness, a short section was added reflecting the *Act* provision (S. 93) which states that where a worker refuses an offer of re-employment, the employer is no longer bound by the re-employment provisions of the *Act*, with respect to the injured worker.

4.6 Case appropriate for re-employment

The WCB believes some of the current wording in *Policy 5.1.3 - Case Appropriate for Re-Employment* is overly broad and requires refinement. Please see section 4 of the draft policy for the new wording.

4.7 Accommodation and Undue Hardship

The WCB has included examples of workplace accommodations as well as factors that will be considered in determining whether an accommodation would pose an undue hardship to the employer. These are consistent with the approach of the NS Human Rights Commission and other WCBs. Please see section 7. of the draft policy.

4.8 Failure to re-employ

As discussed previously in the stakeholder feedback section of this paper, the current policy framework does not adequately distinguish between the use of undue hardship as an argument to not re-employ a worker (*Policy 5.2.6 – Accommodation*) from an employer using a more general defense (*Policy 5.3.1 - Employer Defenses*) for failing to re-employ.

We believe the addition of examples of employer defenses reflective of the original intent of current *Policy 5.3.1*, in combination with the addition of examples and factors to consider in section 7 (accommodation and undue hardship) of the draft policy will improve clarity and transparency on this topic.

4.9 Orders and Penalties

The overall objective of the re-employment process is to assist injured workers in re-establishing a place in the labour market safely, and as quickly as possible, reducing the human and financial toll caused by work-related injuries. The WCB views the issuance of orders and levying penalties as an unfortunate outcome, but a necessary one when re-employment obligations are not being met. The WCB believes the orders and penalties process should be fair, clear, and timely. To that end, we have reviewed and updated the content of the current

policies *5.4.1 - Order to Re-Employ* and *5.4.2 - Penalties Under Section 99 for Breach of Re-Employment Obligations.* See section 9. of the draft policy for the revised content.

Key revisions include:

- The WCB identified some sections of the current policies that are not entirely consistent with the *Act*. In particular:
    - The *Act* states the WCB shall choose the higher of two options when **calculating** the penalty for employer non-compliance with re-employment obligations. The policy gave the WCB the discretion to consider various factors when deciding whether or not to levy the greater or lesser amount. A review of the *Act* indicates the WCB does not have discretion in this area – the WCB must choose the higher amount as a penalty.
    - However, when it comes to **applying** the penalty, the WCB continues to have discretion to reduce or withdraw the penalty based on circumstances specified in the *Act*.
    - The WCB's authority to levy a penalty for failure to comply with an order to re-employ was incorrectly referenced as S. 209 of the *Act*. It should be S. 211 of the *Act*.

- Other changes to orders to re-employ include:
    - Orders to re-employ will now include the penalty amount that will be applied if the worker is not re-employed.
    - Orders must be complied with within 5 days of the receipt of the order. If not, the penalty for **non-compliance with the employer's re-employment obligation** will be applied. As noted above, these penalties may be reduced or withdrawn under certain circumstances.
    - Current policy does not provide any guidance for how the WCB will determine the amount of a penalty for **non-compliance with an order to re-employ**. The WCB has included factors the WCB will consider when making this decision.

4.10 Eliminate Content of Policy 5.5.1 - Re-employment Appeals

The WCB believes this policy should be rescinded. It is no longer consistent with the *Act*, encourages litigiousness, and removes decision-making from those closest to the re-employment process.

To begin, the title of this policy is somewhat misleading. It deals primarily with the process for issuing orders and penalties, and does not elaborate on appealing decisions or orders relating to re-employment. As well, the policy sets out a two-step process for an order to re-employ or a penalty for failure to re-employ to be issued. First, a case worker refers the matter to a "Review Officer" (a role which no longer exists at the WCB) in the Internal Appeals Department. The Review Officer would then refer the question of an employer's violation of re-employment obligations to a Hearing Officer in the department. The Hearing Officer would then decide whether to issue an order or levy a penalty.

The WCB believes this policy is currently inconsistent with the *Act* given its reference to a now non-existent Review Officer position. It also has the potential to encourage litigiousness by moving decision-making to the Internal Appeals department at a time when the workplace parties are still attempting to work out re-employment solutions in the workplace. As well, case workers are the staff members closest to an individual re-employment situation and are in the best position to decide whether or not to issue an order or levy a penalty. Where appropriate they can seek legal advice to inform their decision-making.

Of course, employers and workers have the right to appeal any decisions, orders, or penalties related to re-employment.

5. Providing Your Comments

We are interested to hear your comments on this proposed policy and the information presented in this paper. In particular, we encourage you to consider whether there are any recommended changes or additional topics you would like to see addressed in the proposed re-employment policy. Comments received will assist the WCB in ensuring all the issues are considered as this policy is finalized.

The consultation period concludes on **September 30, 2021**. This paper is also available at www.wcb.ns.ca. Please provide your written feedback by **September 30, 2021** to:

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Appendix A

Re-employment Sections of the *Act*

Application and interpretation of Sections 90 to 101

89 (1) Sections 90 to 101 do not apply to

(a) any employer that, in the opinion of the Board, regularly employs fewer than twenty workers or such other number of workers less than twenty as the Board may prescribe by regulation;

(b) any class or subclass of employers or workers exempted by the Board by regulation by reason of the nature of the industry; or

(c) the construction industry, unless included by the Board by regulation.

(2) Sections 90 to 101 apply only to injuries occurring on or after the coming into force of Sections 90 to 101.

(3) For the purpose of Sections 90 to 101,

(a) "alternative employment" means employment that is comparable to the worker's pre-injury work in nature, earnings, qualifications, opportunities and other aspects;

(b) "suitable work" means work which the worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the worker or any coworkers. 1994-95, c.10, s. 89; 2017, c. 16, s.7.

Duty to re-employ

90 The employer of a worker shall offer to re-employ a worker, in accordance with Sections 89 to 101, where the worker

(a) has been unable to work as a result of the injury; and

(b) had been employed by the employer, at the date of the injury, for at least twelve continuous months. 1994-95, c. 10, s. 90.

Duty to accommodate

91 (1) The employer shall, in order to fulfil the employer's obligations pursuant to Sections 89 to 101, accommodate the work or the workplace to the needs of a worker who requires accommodation as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.

(2) The Board may determine whether the employer has fulfilled the employer's obligations pursuant to subsection (1). 1994-95, c. 10, s. 91.

Duration of duty

92 (1) Subject to subsection (2), an employer is obligated pursuant to Sections 89 to 101 until the earlier of the day that

(a) is two years after the date of the injury to the worker; or

(b) the worker attains the age of sixty-five years.

(2) Where an employer re-employs a worker pursuant to Sections 89 to 101 less than six months before the time described in clause (1)(a), the employer is obligated, pursuant to Sections 89 to 101, for six months after the date of re-employment. 1994-95, c. 10, s. 92.

Employer not bound where offer refused

93 Where

(a) an employer has offered re-employment to a worker pursuant to Sections 89 to 101; and

(b) the worker has refused the employer's offer, the employer is no longer bound by the provisions of Sections 89 to 101 in relation to that worker. 1994-95, c. 10, s. 93.

Presumption of non-compliance

94 An employer who

(a) re-employs a worker pursuant to Section 90; and

(b) terminates the worker's employment within six months of the day the re-employment commenced, is presumed, unless the contrary is shown, not to have fulfilled the employer's obligations pursuant to Sections 89 to 101. 1994-95, c. 10, s. 94.

Determination by Board

95 (1) Any worker may apply to the Board for a determination as to whether the employer has fulfilled the employer's obligations pursuant to Sections 89 to 101.

(2) Where

(a) any worker has made an application pursuant to subsection (1); or

(b) the Board considers it advisable, the Board may determine whether an employer has fulfilled the employer's obligations pursuant to Sections 89 to 101.

(3) The Board is not required to consider an application made pursuant to subsection (1) by a worker who has been re-employed and whose employment is terminated, if the application is made more than three months after the date of termination of employment.

(4) In making a determination pursuant to subsection (1), the Board may consider whether the employer has failed to reinstate the worker pursuant to Sections 89 to 101 for any reason that, in the opinion of the Board,

(a) was beyond the control of the employer and could not have been foreseen and avoided by the exercise of due diligence; or

(b) provides a reasonable justification for the failure. 1994-95, c. 10, s. 95.

Determination by Board

96 (1) The Board may determine, with respect to an injured worker who has not returned to work with the re-injury employer, whether the worker is able to perform

(a) the essential duties of the worker's pre-injury employment; or

(b) suitable work.

(2) The Board may, from time to time, make a re-determination pursuant to subsection (1).

(3) The Board shall notify the worker's employer in writing when it has made a determination or a re-determination pursuant to subsection (1). 1994-95, c. 10, s. 96.

Duty of employer on receiving notice

97 (1) The employer, immediately upon receiving actual notice, or notice from the Board pursuant to Section 96, that a worker is able to perform the essential duties of the worker's pre-injury employment, shall offer to reinstate the worker in the position the worker held on the date of the injury.

(2) Where the Board is satisfied that the employer is unable to reinstate the worker pursuant to subsection (1), the employer shall offer to provide the worker with alternative employment with the employer.

(3) Where the Board is satisfied that the employer is unable to reinstate the worker pursuant to subsection (1) or provide the worker with alternative employment with the employer pursuant to subsection (2), the employer shall offer to provide the worker with suitable work. 1994-95, c. 10, s.97.

Duty of employer on receiving notice

98 (1) The employer, immediately upon receiving actual notice, or notice from the Board pursuant to Section 96, that a worker is able to perform suitable work, shall offer to the worker the first opportunity to accept suitable work that may become available with the employer.

(2) Where

(a) an employer has provided a worker with suitable work pursuant to subsection (1) or subsection 97(3);

(b) the worker is or becomes able to perform work that is more comparable to the worker's pre-injury work; and

(c) work that is more comparable to the worker's pre-injury work is available with the worker's employer, the employer shall offer to the worker the work that is more comparable to the worker's pre-injury work. 1994-95, c. 10, s. 98.

Reinstatement or penalty

99 (1) Where the Board determines that an employer has not fulfilled the employer's obligations pursuant to Sections 89 to 101, the Board may

(a) by order, require the employer to

(i) reinstate the worker in the worker's pre-injury employment, where the worker is able to perform the essential duties of the worker's pre-injury Employment,
(ii) offer the worker alternative employment, pursuant to subsection 97(2),
(iii) offer the worker suitable work; or

(b) levy a penalty on the employer not exceeding the greater of
(i) the full amount of any compensation payable to the worker and any expenditures made by the Board in respect of the worker, during the year after the injury, and
(ii) the amount of the worker's net average earnings for the year preceding the injury,

or both.

(2) The Board may collect any penalty levied pursuant to clause (1)(b) in the same manner as the collection of an assessment.
(3) A penalty levied pursuant to clause (1)(b) may, in the discretion of the Board, be reduced or withdrawn where the Board is satisfied that
(a) the employer has offered the worker suitable work;
(b) the employer has assisted the worker in finding suitable work with another employer; or
(c) the employer cannot, for any reason the Board considers satisfactory, re-employ the worker.
(4) The levying of a penalty pursuant to clause (1)(b) or any action taken by an employer to reduce the penalty pursuant to subsection (3) does not excuse the employer from the obligations on the employer contained in Sections 89 to 101. 1994-95, c. 10, s. 99.

Effect of Sections 89 to 101
100 (1) Where
(a) Sections 89 to 101 conflict with a collective agreement that is binding on the employer; and
(b) the obligations of the employer pursuant to this Section afford a worker better re-employment terms than the terms available to the worker pursuant to the collective agreement, Sections 89 to 101 prevail over the collective agreement, with the exception of any seniority provisions.
(2) Sections 89 to 101 do not prevail over any established rule or practice respecting hiring and placement in the worker's trade or occupation if, in the opinion of the Board, the rule or practice is reasonable.
(3) Where there is a conflict between the provisions of Sections 89 to 101 and Section 71 of the Labour Standards Code, Section 71 of the Labour Standards Code prevails. 1994-95, c. 10, s. 100.

Failure to re-employ not ground for compensation
101 No worker is entitled to any amount as compensation to which the worker would not otherwise have been entitled as a result of the failure of the worker's employer to fulfil the employer's obligations pursuant to Sections 89 to100. 1994-95, c. 10, s. 101.

Appendix B

Working Group Participants
Sessions Held March 16 and March 23, 2021

Employers	Workers and Labour
Office of the Employer Advisor	Pictou County Injured Worker Assoc.
Canada Post	Cape Breton Injured Worker Assoc.
Irving	Office of the Worker Counsellor
Health Association of NS	CUPE
Michelin	NS Nurses Union
	NSGEU

Appendix C

Current Re-employment Policies

Below is a listing of the current re-employment policies in Chapter 5 of the WCB Policy Manual, with a brief description of the key elements of each policy.

Current Policy	Brief Desciption
5.1.1R1 - Employer Coverage	This policy defines what is meant by "regularly employed" for the purposes of determining if an employer meets the threshold for coverage.
5.1.2R - Worker Eligibility	Workers are eligible to be re-employed if, along with other requirements, they been employed by the employer, at the date of the injury, for at least twelve continuous months. This policy explains what is meant by "twelve continuous months"
5.1.3 - Case Appropriate for Re-Employment	Sets out the WCB's authority to determine the appropriateness of invoking the re-employment obligations under certain circumstances.
5.2.1R - Determination of Date of Injury for Purposes of Re-Employment	This policy defines "date of injury" for re-employment purposes only, to be the date the time loss commences.
5.2.2 - Employer's Obligations Within the Re-Employment Period	This policy addresses the length of the re-employment period and reiterates other provisions in the *Act* such as the nature of the work an employer is obligated to offer, and the implications of a worker having a recurrence or taking a job with another employer.
5.2.3 - Termination Within the Re-Employment Period	This policy addresses the implications of terminating a worker during the re-employment period.
5.2.4 - Worker Able to Perform Essential Duties of Pre-Injury Employment	This policy provides more detail on what is meant by "essential duties" and "alternative work"
5.2.5 - Worker Able to Perform Suitable Work	This policy reiterates the employer's obligation to offer suitable employer as it becomes available if re-injury or alternate employment if not available.
5.2.6 – Accommodation	This policy explains what evidence an employer must show to be able to meet the standard of undue hardship.
5.3.1 - Employer Defenses	This policy reiterates the defenses in the *Act* that an employer may put forward for not re-employing a worker.
5.3.2 - Collective Agreements	Reiterates content of the *Act* that states the re-employment provisions take precedence over a collective agreement where there is a conflict, except for seniority.
5.3.3 - Established Hiring Practices in Worker's Trade or Occupation	The re-employment provisions do not apply if practices in the trade provide the worker a better outcome.
5.3.4 - Section 71 of Labour Standards Code	Section 71 of the Labour Standards Code prevails if there is a conflict with the re-employment provisions.
5.4.1 - Order to Re-Employ	The WCB can order and employer to re-employ if they fail to meet their obligations. A penalty may also be levied.
5.4.2 - Penalties Under Section 99 for Breach of Re-Employment Obligations	Outlines penalties for breaches of re-employment provisions.
5.5.1 - Re-employment Appeals	This policy acknowledges that re-employment issues can be appealed. A role referenced in the policy no longer exists and the policy is not applied.

Appendix D

Draft Re-employment Policy

Policy Number: TBD

Topic: Re-employment Obligations
Section:
Subsection:

Effective: TBD
Issued: TBD
Approved by Board of Directors: TBD

Preamble

For most injured workers, early and safe return to work (RTW) occurs quickly, with some workers able to stay at work during recovery. For others, time off from work and/or a workplace accommodation may be needed to achieve a successful RTW.

For those injured workers who are unable to stay at work, the WCB supports all workplace parties to work collaboratively in returning the injured worker to employment. The re-employment sections of the *Workers' Compensation Act* (Sections 89-101) support returning injured workers to the workplace by setting out a re-employment obligation for certain employers.

In particular, employers (except those in the construction industry) who regularly employ 20 or more workers are obligated to re-employ an injured worker who has missed time from work due to the work injury if: 1) that injured worker has been employed with them continuously for at least one year prior to the work-related injury; and 2) the worker can perform the essential duties of their pre-injury job, or other suitable work.

The WCB, typically, is not required to formally invoke the re-employment obligations. Where disputes arise, the WCB will meet with the employer and injured worker as a part of the case management process in an attempt to identify barriers to re-employment and establish a plan to return the worker to the workforce. Where disputes cannot be resolved, the WCB will take appropriate actions to invoke the re-employment obligations in the *Act*, which may include issuing orders to re-employ or levying penalties.

This policy provides guidance and interpretation of the re-employment obligations, and other supporting provisions, set out in the *Workers' Compensation Act (the "Act")*.

Policy

1. Re-employment Obligations and Human Rights Legislation

Under human rights law, all employers have a duty to accommodate workers with disabilities. The *Nova Scotia Human Rights Act* and (for federally regulated employers) the *Canadian Human Rights Act* apply in Nova Scotia. In addition, provided certain criteria are met, employers have an obligation under the *Act* to accommodate and re-employ workers injured on the job. The WCB's jurisdiction to deal with issues of accommodation applies only to a workplace accommodation required for the compensable work injury.

In circumstances where the re-employment provisions of the *Act* apply, the WCB is responsible for determining whether an employer has met its obligation to accommodate the worker to the

point of undue hardship. If WCB determines that an employer or injured worker has not fulfilled their obligations under the *Act*, the employer or injured worker has the right to appeal a WCB decision.

If the worker also requires accommodation under the *Nova Scotia Human Rights Act* or the *Canadian Human Rights Act*, employers may have additional accommodation requirements that coincide with actions taken as part of the WCB re-employment process. Complaints about accommodation for those other protected grounds should be made to the Nova Scotia Human Rights Commission or the Canadian Human Rights Commission.

2. Employer Coverage and Worker Eligibility

2.1 Employers

a) All employers, except those in the construction industry[2] and those who are determined by the WCB to regularly employ fewer than twenty employees, are obligated to offer re-employment to an eligible injured worker.

b) An employer shall be deemed to have "regularly" employed twenty or more workers if the company actively employed and paid:

i) at least twenty workers per month in eight out of the twelve months preceding the calendar month of the worker's injury; and
ii) an average of twenty workers per month over the twelve months preceding the calendar month of the worker's injury.

2.2 *Workers*

An employer covered by the re-employment sections of the *Act* is obligated to offer re-employment to a worker following an injury, where the worker's circumstances meet the following conditions:

a) The worker has been unable to perform work for the employer for a period of time, due to the injury. Eligibility for earnings replacement benefits is not a necessary pre-condition to this obligation; and
b) The worker has been employed by the employer for at least twelve continuous months, including eligible pauses, at the time of the accident. Eligible pauses are those that are less than thirty calendar days, or those are thirty calendar days or more where the pauses:
    i. have been authorized by the employer (e.g. leaves of absence, vacations, or suspensions);
    ii. are the right of the worker under other legislation (e.g. maternity / paternity leaves; or
    iii. are supported by substantive evidence of a continuing employment relationship (e.g. payment of ongoing employer paid benefits).

Generally, this will exclude those workers with sporadic, casual or short-term pre-injury tenure.

[2]Employers classified under SIC codes 4011-4499 in the Standard Industrial Classification (SIC) published by Statistics Canada

3. Obligations of Injured Workers

Injured workers are responsible for mitigating the loss caused by a work-related injury by taking all reasonable steps to reduce or eliminate any impairment and loss of earnings resulting from a work-related injury. This includes accepting bona fide offers of re-employment made by an employer and cooperation with efforts to accommodate the work or the workplace in order to facilitate re-employment.

4. Determining if case appropriate for re-employment

The WCB may delay or determine it is inappropriate to move to enforce the re-employment provisions where:

a) the work injury has not plateaued sufficiently medically or functionally to attempt re-employment;
b) labour / management issues will interfere with the re-employment process; or
c) the WCB has determined there is an established hiring and / or placement practice in the worker's trade or occupation that is reasonable and provides the worker with similar or improved re-employment opportunities.

The WCB's assessment of the situation may change and it may be determined at a future date that it is appropriate to move forward with re-employment.

5. Re-employment Obligations of Employers

5.1 Pre-injury circumstances

References to pre-injury circumstances refer to those circumstances which existed when the worker's time loss commenced.

5.2 Terms and conditions at the time of the accident

The employer's re-employment obligation is generally limited to the duration of the pre-injury contract and / or the nature of the pre-injury employment arrangement.

5.3 Worker able to return to work with pre-injury employer

When the worker has recovered sufficiently such that the worker is fit for either the essential duties of the pre-injury job or for suitable employment the WCB will notify the employer, in writing, of the worker's status.

a) Worker able to perform essential duties

i) The employer shall offer to re-instate the worker into the pre-injury employment immediately upon receiving written notice from the WCB that the worker is capable of performing the essential duties associated with the work. Essential duties constitute the core tasks which achieve the usual outcome of the work at a normal rate of productivity.

ii) If the employer has satisfied the WCB that it is unable to re-instate the worker to the pre-injury employment, the employer shall offer the injured worker alternative work.

Alternative work is considered to be equivalent to the pre-injury employment in its duties, functional demands, obligations, rights, rules, earnings, qualifications, opportunities and any other pertinent aspects which are considered to be relevant.

iii) Other pertinent aspects may include, but are not limited to:

- geographic location of the work;
- level of responsibility and supervision of other employees;
- skills, qualifications, and experience required; and
- bargaining unit status.

iv) The following factors may be considered in determining whether the geographic location of the alternative work is comparable to the pre-injury employment:

- travel or assignment to different job sites is the normal practice of the industry;
- travel or assignment to a job site other than the injury job site forms part of the employment contract;
- the worker normally accepts employment assignments in various geographic areas;
- travelling to the alternative employment falls within the normal parameters of travel expected of the worker; and
- the reasonableness of the offer.

If the employer has satisfied the WCB that it cannot offer pre-injury or alternative work, the employer shall offer to provide the injured worker with suitable work.

b) Injured worker able to perform suitable work only

i) Upon receiving written notice that the injured worker is fit to return to suitable employment, an employer shall offer an injured worker the first opportunity to accept suitable work that may become available. Suitable work is work the injured worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the injured worker or any coworkers.

ii) As the injured worker's functional capability continues to increase, the employer shall, for the duration of the re-employment period, continue to offer available work which more closely compares to the pre-injury employment.

c) If there is a dispute about whether an injured worker is medically able to perform the essential duties of the pre-accident job or suitable work, the WCB will make the final determination. In making it's determination, the WCB and may arrange for a worksite analysis or gather other relevant information.

5.4 Collective Agreements

Where the terms of a collective agreement conflict with the re-employment provisions, whichever provides the injured worker better re-employment opportunities shall prevail, with the exception that seniority provisions set out in the collective agreement always prevail.

5.5 Suitable work with another employer

Where an employer is unable to offer the injured worker re-employment opportunities within the company, but assists the worker is finding suitable work with another employer, the obligation remains with the accident employer until the expiration of the obligation period.

6. Length of Re-employment Obligation

6.1 Length of Obligation

An employer's obligation to re-employ an injured worker continues from the date they receive notice of the injured worker's ability to return to either pre-injury employment or other suitable work until the earlier of:

a) the second anniversary of the date of injury; or
b) the 65th birthday of the worker.

6.2 Re-instatement in last six months

Where the injured worker is re-instated in the last six months of the re-employment period, the obligation is extended for an additional six months beyond the date of re-employment.

6.3 Worker refuses offer of re-employment

An employer is no longer bound by the re-employment provisions of the *Act,* with respect to an injured worker, where that injured worker refuses an offer of re-employment made in accordance with the reemployment provisions of the *Act* and this policy.

6.4 Definition of "date of injury"

For the purposes Sections 89-101 of the *Act* only "date of injury" means the date that time loss commences.

6.5 Recurrences

Where a worker, who continues to be employed by the accident employer, suffers a recurrence within the re-employment period, the accident employer continues to be bound by the re-employment provisions.

7. Accommodation and Undue Hardship

7.1 Duty to Accommodate

The employer shall accommodate the work or workplace to facilitate an injured worker's return to work, providing the injured worker is capable of performing either the essential duties of the pre-injury employment or suitable employment. The employer is required to accommodate the injured worker to the extent that the accommodation does not cause the employer undue hardship.

The expectations and requirements for accommodation and meeting the undue hardship standard for re-employment in the *Act* are consistent with those required by human rights law. Examples of possible accommodations include, but are not limited to, such things as:

a) supplying or modifying tools or equipment;

b) making the premises accessible;
c) modifying the hours of work or offering flexible work;
d) changing schedules;
e) moving the worker to a different work location;
f) altering aspects of the job, such as job duties; and/or
g) moving the worker to a different job.

While there are potentially many options to accommodate an injured worker, employers are not expected to create an unnecessary job for the injured worker. That is, an employer is not required to create a new permanent position expressly for the injured worker that is comprised of new duties that were previously non-existent that do not add value or provide a benefit to the employer.

7.2 Claiming Undue Hardship

Where the employer claims that an accommodation will cause undue hardship, the onus is on the employer to show adequate evidence of the detrimental impact on productivity, the operation, or the profitability of the business. There are general principles that set out the factors usually considered when assessing undue hardship, but the finding of undue hardship will vary according to the specific circumstances. What is undue hardship for one employer may not be for another. Factors that may be considered in determining whether the accommodation would pose an undue hardship include:

a) employee and customer safety;
b) financial cost;
c) interchangeability of the workforce and facilities;
d) disruption of a collective agreement;
e) disruption of services to the public;
f) the morale of other employees; and
g) the size of the employer's operation.

Where the WCB is satisfied that the accommodation will cause undue hardship, it may assist the employer in overcoming the hardship and/or may assist the worker directly, if the worker is otherwise eligible under the vocational rehabilitation program.

8. Failure to re-employ

8.1 Defenses for failure to re-employ

a) The employer may claim that failure re-employ an injured worker is due to:

i) reasons beyond the control of the employer that could not have been foreseen and avoided by the exercise of due diligence; or
ii) other justifiable reasons.

b) Examples of possible reasons for a failure to re-employ include, but are not limited to:

i) The re-employment obligation expires.
ii) The worker refuses an offer of employment.

iii) The employer is unable to offer pre-injury or alternative work. The WCB presumes an employer is able to offer the employment unless there is evidence to the contrary, for example, such as:

- The employer has permanently or temporarily laid off the staff in that function;
- The essential duties of the position have genuinely changed and now exceed the worker's functional ability, skills, and/or ability to obtain skills;
- The worker had been employed on a fixed-term contract which has expired, and for which there is no longer need of the worker's services.
- The employer can only meet their re-employment obligation by violating the Section 71 Labour Standards Code rights of another employee.

iv) Suitable work is unavailable:

- Where an injured worker is fit only for suitable work, the employer is required to offer such employment as it becomes available during the re-employment period.
- Therefore, unavailability of suitable work is a defence to not re-employing an injured worker, but only for the period of time in which the work is unavailable.

8.2 Termination within six months of re-instatement

Where an employer terminates an injured worker's employment within six months of re-instatement, the onus will be on the employer to provide evidence that the termination is for reasons unrelated to the worker's injury and / or claim.

8.3 WCB review

The WCB may on its own initiative, or at the request of the worker, make a determination about whether the employer has fulfilled their re-employment obligations. In making its determination, the WCB may consider evidence from the employer and other appropriate sources, including the worker.

9. Orders and Penalties

9.1 Order and penalty upon finding of non-compliance with re-employment obligation

Upon determining that an employer has failed to meet its re-employment obligations, the WCB shall issue a specific and written order to the employer directing that the employer re-employ the injured worker as prescribed in the order. The order shall specify, at a minimum, that the employer is to re-employ the injured worker within 5 days of receipt of the order. The order will also notify the employer that the WCB will levy a penalty (amount to be calculated as described below) if the injured worker is not re-employed within the 5 days stipulated in the order.

9.2 Penalty calculation - non-compliance with re-employment obligation

The penalty for non-compliance with an employer's re-employment obligations will be the greater of:

a) the full amount of any compensation payable to the worker and any expenditures made by the WCB in respect of the worker, during the year after the injury, or

b) the amount of the worker's net average earnings for the year preceding the injury;

9.3 Reduction or withdrawal of re-employment obligation penalty

The penalty levied for an employer's non-compliance with their re-employment obligations may, at the discretion of the WCB, be reduced or withdrawn where the WCB is satisfied that:

a) the employer has offered to re-employ the worker as specified in the order, or assists the worker in finding suitable work elsewhere. In these instances, the penalty may be no less than the wages which the worker would have earned during the delay in re-employment.; or
b) the employer has provided a defense for not re-employing the worker that meets the requirements of Section 8 of this policy.

9.4 Penalty for non-compliance with order

a) Where the employer fails to comply with the order to re-employ, the WCB may levy a penalty of two thousand dollars for the first offence. Penalties for subsequent failures to comply with an order to re-employ may be levied at the WCB's discretion to a maximum of ten thousand dollars.

b) In determining whether to apply a penalty in the first instance, or the amount of a penalty for non-compliance with an order to re-employ, the WCB will take into consideration the employer's:

i) history of compliance with re-employment obligations or orders to re-employ; and
ii) overall willingness to co-operate in the re-employment process.

Application

This Policy applies to workers whose date of injury is on or after TBD (see Section 5.3 Definition of Date of Injury).

References

Workers's Compensation Act, Sections 84, 89-101, 211

Appendix E

Table of Concordance

This table provides a high-level explanation of where the content of the current re-employment policies can be found in the draft NEW policy. It also highlights key additions or changes that have been made. **All of these policies will be rescinded and replaced by the draft policy in Appendix D**.

Draft NEW Re-employment Policy Sections	Source of Policy Content
Preamble	N/A
1. Re-employment and Human Rights Legislation	• New content. There is no discussion of relationship between re-employment and human rights legislation in current policies.

2. Employers and Workers Covered by Re-employment Obligation	• Section 2 of the draft NEW policy is based on current policies:
	  ○ *5.1.1R1 - Employer Coverage*
	  ○ *5.1.2R - Worker Eligibility*
	• Simplified/streamlined wording.
	• Change: Did not include in the draft NEW policy the reference in policy *5.1.1R1* to Canada Revenue Agency "Remittance for Current Source Deductions", Form PD7A. This is a procedural requirement not typically included in policy. Staff will seek out appropriate information to confirm the number of regularly employed, which may include CRA information.
	• Change: Removed the statement “The employer is defined as the company to which the firm number for the WCB's assessment purposes applies.” In policy *5.1.1R1*. These is unnecessary. The other provisions in this section of the policy cover the issue.

3. Obligations of Injured Workers	• Change: New content. No specific section in existing policies on worker obligations. • Outlines general responsibility of injured worker to participate in mitigation of effects of injury.
4. Determining if case is appropriate for re-employment	• The content of section 4 of the draft NEW policy is taken from *Policy 5.1.3 - Case Appropriate for Re-Employment*. • Change: The current policy states WCB can defer or deny a case for re-employment where “the case management process has not been completed”. The WCB finds this phrase is overly broad in this context. For example, an injured worker could be in case management for an extended period of time without it necessarily impacting their ability to be re-employed. Therefore, this policy provision has been clarified in the draft policy and now reads “the WCB may delay or determine it is inappropriate to enforce the re-employment provisions where: a) the work injury has not plateaued sufficiently medically or functionally to enable an attempt at re-employment”…. • Added content of current *Policy 5.3.3 - Established Hiring Practices in Worker’s Trade or Occupation* to this section of the draft NEW policy.

5. Re-employment Obligations of Employers	• The bulk of content in section 5 of the draft NEW policy comes from these current policies:
	  ○ *5.2.2 - Employer’s Obligations Within the Re-Employment Period*
	  ○ *5.2.4 - Worker Able to Perform Essential Duties of Pre-Injury Employment*

	○ *5.2.5 - Worker Able to Perform Suitable Work placed in section 5 of draft policy.* • Change: Added a series of factors to consider when deciding if alternative employment offered by the employer is equivalent to pre-injury employment. • Moved the statement "references to pre-injury circumstances refer to those circumstances which existed when the worker's time loss commenced." from current *Policy 5.2.1R* to section 5 of the draft NEW policy. • Moved content of current *Policy 5.3.2 - Collective Agreements* to section 5 of the draft NEW policy.
6. Length of Re-employment Obligation	• The content of section 6 of the draft NEW policy is taken from policies: ○ *5.2.1R- Determination of Date of Injury for Purposes of Re-Employment* ○ *5.2.2- Employer's Obligations Within the Re-Employment Period* ○ Change: For completeness, added a section that states that where a worker refuses an offer of employment, the employer is no longer bound by the re-employment provisions of the *Act* with respect to the worker. The actual provision is not new – it is in S. 93 of the *Act*.
7. Accommodation and Undue Hardship	• The content of current *Policy 5.2.6 – Accommodation* has been placed in section 7 of the draft NEW policy. • Change: Examples of potential accommodations and factors that may be considered when determining if an accommodation would be an undue hardship have been included.
8. Failure to re-employ	• The content of the following policies has been moved to section 8. of the draft NEW policy: ○ *Policy 5.3.1 - Employer Defenses* ○ *Policy 5.2.3 - Termination Within the Re-Employment Period* moved to section 8 of the draft policy ○ *Policy Number: 5.3.4 - Section 71 of Labour Standards Code* • Change: Removed reference to onus on the worker to provide evidence that a termination from employment more than 6 months after reinstatement, but still within the re-employment period, is related to the injury and/or claim.
9. Orders and Penalties	• The basis for the content of this section of the draft NEW policy are current policies: ○ *Policy 5.4.1 - Order to Re-Employ* ○ *Policy 5.4.2 - Penalties Under Section 99 for Breach of Re-Employment Obligations* • Change: The content of the policies was updated to ensure consistency with the *Act*. It is now clear in the policy the WCB does not have discretion to choose the lesser penalty amount specified in the *Act* (S.99) when calculating the penalty for non-compliance. The WCB must choose the higher amount. However, as is the case today, the WCB is still able to consider mitigating factors when it comes time to actually apply the penalty. • Change: A time limit has been included for compliance with an order to re-employ. The order will include the penalty amount that will be applied if the employers fails to comply. • Change: Factors the WCB may consider when determining the penalty amount for non-compliance with an order to re-employ have been included to support transparency and fairness.
N/A	• The content of Policy *5.5.1 - Re-employment Appeals* has not been included in the draft policy.